In The

MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1972

Docket No. 72-5303

ALEX BIRNBAUM,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION

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STATE'S APPENDIX

State Grand Jury Indictment No. 818-69

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION — CRIMINAL

THE STATE OF NEW JERSEY	
vs.	: State Grand Jury No. SG 72-70-98
CHARLES FISCHER, ALEX BIRNBAUM, FRED CAPPADONA, GEORGE LATTIMORE and JOAN JANISZEWSKI,	: Indictment No. I-818-69
Defendants.	:

COUNT I

The Grand Jurors of and for the State of New Jersey, upon their oaths, present that

CHARLES FISCHER

ALEX BIRNBAUM

FRED CAPPADONA

GEORGE LATTIMORE

and JOAN JANISZEWSKI

on the 24th day of July 1968, at the City of New Brunswick, in the County of Middlesex, in the State of New Jersey, and within the jurisdiction

of this Court, did forcibly take from the person of Hyman Merson money to the value of $6,100.00, the property of the Great Eastern Discount Center by violence and putting the said Hyman Merson in fear, contrary to the provisions of N.J.S. 2A:141-1, and against the peace of this State, the government and dignity of the same.

COUNT II

The Grand Jurors of and for the State of New Jersey, upon their oaths, present that

CHARLES FISCHER

ALEX BIRNBAUM

FRED CAPPADONA

GEORGE LATTIMORE

and JOAN JANISZEWSKI

on the date, at the place and in the jurisdiction set forth in the first count herein, did have in their possession a firearm while committing the robbery of the said Hyman Merson, contrary to the provisions of N.J.S. 2A:151-5, and against the peace of this State, the government and dignity of the same.

s/ George F. Kugler, Jr.
George F. Kugler, Jr.
Attorney General

Indictment

A TRUE BILL:

s/ Fred G. Haumacher
Fred G. Haumacher, III
Foreman of the State Grand Jury

Order of the Middlesex County Court

(Filed March 15, 1972)

MIDDLESEX COUNTY COURT
LAW DIVISION (CRIMINAL)
INDICTMENT NO. 818-69
FILE NO. 70-890

STATE OF NEW JERSEY, :

-vs- :

ALEX BIRNBAUM, :

Defendant, :

This matter having been brought before the Court by, Alex Birnbaum, Pro Se, appearing Pro Se, and Robert H. Corbin, Esq., Assistant Prosecutor, appearing on behalf of the State; and

The Court having heard and considered the arguments of counsel and for other good cause shown;

It is on this 15th day of March, 1972, ORDERED that the defendant's motion to quash for lack of speedy trial be and the same is hereby denied.

s/ Dubois S. Thompson
DUBOIS S. THOMPSON, J.C.C.

Order of the Supreme Court of New Jersey

(Filed May 23, 1972)

SUPREME COURT OF NEW JERSEY

M-307 September Term 1971

State of New Jersey,)

Plaintiff-Respondent,)

vs.)

Alex Birnbaum,)

Defendant-Appellant.)

This matter having been duly presented to the Court, it is Ordered that the motion for leave to appeal from denial of application to dismiss indictment is denied.

Witness, the Honorable Joseph Weintraub, Chief Justice, at Trenton, this 23rd day of May, 1972.

s/ Irving B. Zuchan
Acting Clerk

Notice of Appeal from Final Judgment of Convictions

(Filed August 25, 1972)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
State House Annex
Trenton, N.J.

August 24, 1972

Docket No. A-2737-71
Re: State vs. Birnbaum

Dear Sir:

An Amended Notice of Appeal was docketed on August 23, 1972 under the above docket number. Please make sure that this number is shown on all papers, including appendices and briefs, hereafter submitted for filing.

The court has requested me to direct your attention to the fact that the time prescribed for perfecting an appeal cannot be extended by consent of counsel but only by the court for good cause shown. Applications for extension of time, if needed, may be by verified petition and original and one copy of consent order, which are to be submitted to this office for forwarding to the court for approval. Failure to obtain consent will necessitate a formal Notice of Motion.

The court has also requested me to remind you that counsel should only expect to add new cases when they have been reported after the preparation of the brief. As soon as such cases

are discovered they should be brought to the attention of the court by submitting them in quintuplet to this office with a copy to other counsel appearing in the case.

After the appeal becomes a "ready" case, counsel should alert the Clerk's office to any vacation plans or emergent situation so that oral argument may, if requested, be scheduled on a convenient date.

Very truly yours,

s/ Kenneth S. Barsby
Kenneth S. Barsby
Clerk of the Appellate Division

Enc.
* Please refer to Rule 2:5-3 (d) and Rule 2:6-12 with respect to transcript of testimony.

cc Middlesex County Prosecutor

Affidavit of Barnett Hoffman

STATE OF NEW JERSEY :
SS
COUNTY OF MIDDLESEX :

Barnett Hoffman, being of full age, duly sworn upon his oath, deposes and states that:

1. I am an Assistant County Prosecutor for the County of Middlesex, State of New Jersey, and in said capacity, I was assigned, in December, 1971, to prepare for trial, and to try the case of State vs. Birnbaum, in which the defendant, who is the petitioner in the matter before the Court, was charged with the crime of armed robbery.

2. This affidavit has been prepared because the petitioner has not provided the State with a transcript, and consequently there is no record to which the State can refer in responding to the numerous factual allegations contained in the petitioner's Petition for Writ of Certiorari. The statements herein are based on my review of the State's file, and my recollection of interviews with State's witnesses, conferences with statewide law enforcement officers and prosecutors in preparation for trial, motions raised before, during and after trial, the events of the trial itself and all appeals relating thereto, to the best of my knowledge, information and belief.

3. On July 24, 1968, in the City of New Brunswick, Middlesex County, an armed robbery was committed against one Hyman Merson.

Affidavit of Barnett Hoffman

4. After an intensive and widespread investigation involving the New Jersey State Police and several other law enforcement agencies, a confession was obtained from one Jerome McKenney to the armed robbery described above in addition to more than one hundred (100) other crimes in five different states. His confession to the New Brunswick armed robbery implicated the petitioner and five other people.

5. Detective Dale Cordy of the New Jersey State Police was assigned to investigate and verify McKenney's confession to the New Jersey cases and to coordinate with law enforcement officials of neighboring states on the crimes committed therein.

6. During the course of the next several months, Detective Cordy and others performed the immense task of investigation and verification of McKenney's statements in preparation for presentation to the New Jersey State Grand Jury.

7. McKenney's testimony relating to approximately eighteen (18) different crimes in the State of New Jersey was presented to the State Grand Jury during the month of April, 1970, and on April 29, the Grand Jury returned indictments based on McKenney's testimony including I-818-69, charging the petitioner and four others with the New Brunswick armed robbery.

8. One of the many charges to which Jerome McKenney confessed his guilt and for which he

was convicted, was a federal charge, as a result of which he was incarcerated in the Lewisburg Penitentiary and in a federal prison hospital in Missouri where he was treated.

9. Subsequent to the filing of indictments on April 29, 1970, and prior to trial of the matter sub judice, McKenney testified in four other New Jersey trials and numerous trials in the State of Pennsylvania, all of which involved consumption of time in following prescribed procedures to have the prisoner removed from federal prison and transported to the site of the trial.

10. Jerome McKenney was an absolutely essential witness in the State's case, without whom conviction would have been virtually impossible.

11. In August, 1969, the petitioner was arrested and incarcerated in Ocean County, New Jersey, on other charges, and he has remained incarcerated on other charges, in addition to the charges giving rise to the matter before the Court, to date.

12. To the best of my knowledge, information and belief, the lapse of time between securing Jerome McKenney's confession in September, 1969, and the trial in April, 1972, was not due to conscious attempts by law enforcement or prosecutorial agents to subvert petitioner's constitutional rights, and the delay in no way deprived the petitioner of his ability to defend himself.

s/ Barnett Hoffman
BARNETT HOFFMAN

Affidavit of Barnett Hoffman

Sworn and subscribed before me
this 4th day of December, 1972.

s/ Thomas J. Kapsak
Attorney at law of the
State of New Jersey

In The

Supreme Court of the United States

October Term, 1972

Docket No. 72-5303

ALEX BIRNBAUM,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The respondent, the State of New Jersey, answering the petitioner's Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division, respectfully shows:

New Jersey State Grand Jury Indictment 818-69 charging the petitioner and four others with armed robbery in State's Appendix 1 (Sa1), attached hereto.

A copy of Order by Middlesex County Court Judge Dubois S. Thompson denying petitioner's Motion to Dismiss the Indictment for lack of speedy trial, in State's Appendix 2 (Sa4), attached hereto.

Facsimile of an Order signed by the Honorable Milton B. Conford, Presiding Judge of the Appellate Division denying petitioner's motion for leave to appeal from the Interlocutory Order of the Middlesex County Court, in Appendix A2a attached to petitioner's Petition.

A copy of an Order of the Supreme Court of New Jersey, by the Honorable Joseph Weintraub, Chief Justice, denying petitioner's Motion for Leave to Appeal from the Interlocutory Order of the Middlesex County Court, in State's Appendix 3 (Sa5) attached to petitioner's Petition.

Notice from the Superior Court of New Jersey that an Amended Notice of Appeal (from final judgment of conviction) has been received and docketed by the Clerk of the Appellate Division on August 23, 1972, in State's Appendix 4 (Sa6), attached hereto.

An affidavit by Assistant County Prosecutor Barnett Hoffman setting forth pertinent facts in lieu of transcript, in State's Appendix 5 (Sa8), attached hereto.

Counterstatement Concerning Jurisdiction

The State of New Jersey concedes that if this Court has jurisdiction, it must be invoked and authorized by 28 U.S.C., Sec. 1257(3).

We respectfully submit, however, that no final judgment was rendered below in the Supreme Court of New Jersey, nor did it decide any federal question of substance not heretofore determined by this Court, or contrary to the applicable decisions of this Court.

We respectfully submit further, that the opinion of the Supreme Court of New Jersey is in conformity with the provisions of the United States Constitution respecting the rights of an accused to a speedy trial, and to due process, and presents no departure from the applicable decisions of this Court.

Statement of Facts and Procedural History

On July 24, 1968, Hyman Merson, Store Manager of the Great Eastern Discount Center, located in New Brunswick, New Jersey, was the victim of an armed robbery (Sa1). A period of intensive investigation ensued, involving several different law enforcement agencies, and culminating in a confession by one Jerome McKenney in September of 1969, during which he implicated the petitioner and five other persons (Sa9 par. 4). McKenney confessed to more than one hundred (100) different crimes in all, encompassing a five state area (Sa9 par. 4).

During the course of the next several months, the New Jersey State Police, the Federal Bureau of Investigation and many other law enforcement agencies investigated and attempted to verify McKenney's statements, in preparation for presentation to the New Jersey State Grand Jury (Sa9 par. 6).

McKenney's testimony relating to approximately eighteen (18) different crimes in the State of New Jersey was presented to the State Grand Jury during the month of April, 1970, and on April 29, the Grand Jury returned indictments based on McKenney's testimony, including I-818-69, charging the petitioner and four others with the New Brunswick armed robbery (Sa9 par. 7).

On June 9, 1970, the petitioner sent a letter to the Honorable Leon Gerofsky, Judge of the Superior Court, and Assignment Judge for Middlesex County, in which he asked for an early trial date.

Subsequent to the filing of the Indictment herein, and prior to trial of the matter sub judice, Jerome McKenney testified in four other New Jersey trials and numerous trials in the State of Pennsylvania, all of which involved consumption of time in following prescribed procedures to have the prisoner removed from federal prison, where he was then incarcerated, and transported to the site of the trial (Sa9 par. 8 - Sa10 par. 9).

The charges against three of the defendants, the petitioner, Charles Fischer, and Fred Capadonna, were scheduled for trial on February 28,

1972, but were delayed by motions by all defendants to dismiss the indictments for lack of speedy trials. Motions were denied (Sa4) and a new trial date was set for March 20, 1972. Defendants filed motions for leave to appeal from the Interlocutory Order of the County Court (Petitioner's Appendix C-12a). Petitioner's Motion for Leave to Appeal was denied (Petitioner's Appendix A-2a) but co-defendant Fischer's motion was granted (Petitioner's Appendix D-37a) and the trial was further delayed until the Appellate Division affirmed the County Court's denial of Fischer's Motion to Dismiss the Indictment.

The three defendants were tried together from April 17 to May 3, 1972, and all were convicted of armed robbery.

On May 23, 1972, the Supreme Court of New Jersey also denied the petitioner's Motion for Leave to Appeal (Sa5).

On July 10, 1972, the petitioner was sentenced to the New Jersey State Prison for a term of three to five years, to run consecutively to other sentences currently being served.

On August 23, the petitioner filed a Notice of Appeal (from final judgment of conviction) with the Appellate Division (Sa6).

Questions Presented

1. Whether this Court has jurisdiction to grant Certiorari from an Order of the Supreme Court of New Jersey, denying petitioner's Motion for Leave to Appeal from an Interlocutory Order of the trial Court, while there is presently pending before the Appellate Division of the Superior Court of New Jersey, an appeal from final judgment of conviction.

2. Whether the defendant has been deprived of his constitutional rights to due process and a speedy trial.

Argument

Point I

Petitioner and respondent agree that if this Court has jurisdiction to review the proceedings below, it has been conferred on the Court by 28 U.S.C. §1257. Section 1257 provides, in pertinent part:

> Final judgment or decrees rendered by the highest Court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (3) by Writ of Certiorari, . . . where any title, right, privilege or immunity is . . . claimed under the Constitution of . . . the United States.

A final judgment was defined in Market St. Ry. Co. v. Railroad Commission of the State of California, 65 S. Ct. 770, 324 U.S. 548, 89 L. Ed. 1171 (1945), wherein this Court stated that:

> A State Court judgment, to be within appellate jurisdiction of the United States Supreme Court, must be "final" in two senses: it must be subject to no further review or correction in any other state, tribunal, and must be an effective determination of the litigation, and not of merely interlocutory or intermediate steps therein; it must be the final word of a final Court.

In Whitus v. The State of Georgia, 87 S. Ct. 643, 385 U.S. 545, 17 L. Ed. 599 (1967) a Writ of Certiorari to review a state court denial of petitioner's interlocutory appeal was denied for lack of finality. See also Evans v. Delaware County, Commonwealth of Pennsylvania, 390 F.2d 617, cert. denied 89 S. Ct. 164, 393 U.S. 873, 21 L. Ed. 2d 143 (1968).

The "final judgment" below, which the petitioner asks this Court to review is an Order by the Supreme Court of New Jersey, dated May 23, 1972, denying petitioner's Motion for Leave to Appeal from an Interlocutory Order of the Middlesex County Court. By entry of this Order, the Supreme Court of New Jersey did nothing more than refuse to consider the propriety of an interlocutory ruling by the trial Court, before final judgment was entered. It neither rendered final judgment on the question nor foreclosed the petitioner from raising it again in due course. In fact, there is

presently pending in the Appellate Division of the Superior Court of New Jersey, an appeal from final judgment of conviction, docketed August 23, 1972 (Sa6), to which the petitioner is entitled as a matter of right, under Rule 2:2-3 of the Rules Governing the Courts of the State of New Jersey. Until this appeal has been decided, there will have been no "final word of a final Court."

Point II

The Sixth Amendment to the Constitution of the United States of America ensures to every accused, "the right to a speedy and public trial," and the Supreme Court of the United States, in Klopfer v. North Carolina, 386 U.S. 213, 18 L. Ed. 2d 1, 87 S. Ct. 988 (1967), established that the right to speedy trial is "fundamental," and is imposed on the States by the Due Process Clause of the Fourteenth Amendment. See Smith v. Hooey, 393 U.S. 374, 21 L. Ed. 2d 607, 89 S. Ct. 575 (1969); Dickey v. Florida, 398 U.S. 30, 26 L. Ed. 2d 26, 9 S. Ct. 1964 (1970).

The interests of an accused, meant to be protected by speedy trial, have been construed by this Court to be:

1) freedom from oppressive pre-trial incarceration.

2) minimization of the anxiety and concern accompanying public accusation and,

3) impairment of the ability of an accused to defend himself. United States v. Ewell, 383

U.S. 116, 120, 15 L. Ed. 2d 627, 630, 86 S. Ct. 773 (1966); Barker v. Wingo, 92 S. Ct. 2182, 33 L. Ed. 101 (1972).

This Court has also held, however, that "while justice should be administered with dispatch, the essential ingredient is orderly expedition, and not mere speed," Smith v. United States, 360 U.S. 1, 10, 3 L. Ed.2d 1041, 1048, 79 S. Ct. 991 (1959), and "the right to a speedy trial" is necessarily relative. It is (not necessarily inconsistent) with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice. Beavers v. Haubert, 198 U.S. 77, 49 L. Ed. 950, 25 S. Ct. 573 (1905); United States v. Ewell, supra. And, more recently, in Barker v. Wingo, supra at 33 L. Ed. 2d at 116, 117, the Court described the necessity for an ad hoc balancing test in which conduct of both the prosecution and the defendant would be weighed. The factors to be considered are,

1) length of delay

2) reasons for delay

3) whether the accused has been prejudiced thereby, and

4) whether the accused has sought a speedy trial.

This Court has held that the right to a speedy trial does not attach until the person claiming such right becomes an accused, and if said person

is not formally charged prior to indictment, Sixth Amendment rights do not attach until the date of the indictment. United States v. Marion, 92 S. Ct. 455, 404 U.S. 307, 30 L. Ed. 2d 468 (1971). Therefore, the delay in question occurred between April 29, 1970, the date of indictment, and February 28, 1972, the date on which the charges against the petitioner were first listed for trial. (Motions by petitioner and co-defendants further delayed the start of the trial until April 17, 1972.)

The State offers only one reason in justification for the delay between indictment and trial, and that is the limited availability of an essential witness, Jerome McKenney. McKenney confessed to New Jersey authorities complicity in more than one hundred crimes encompassing a five state area, including the New Brunswick armed robbery. His testimony before the New Jersey State Grand Jury resulted in the indictment of the petitioner and four others, and established McKenney as an absolutely essential witness when the case went to trial. During part of the period between indictment and trial, McKenney who had pleaded guilty to federal charges, among many others, was incarcerated in federal institutions. During that period, he provided accomplice testimony in four New Jersey prosecutions, and many others in Pennsylvania, all of which consumed considerable periods of time. When he finally became available to testify for the State on the New Brunswick charges, nearly one year and ten months had elapsed.

Petitioner makes no claim in his brief that his ability to defend himself was prejudiced by the delay. In fact, he argued strenuously at trial that the memories of state's witnesses were dimmed by the passage of time, and that therefore their testimony was less credible than it would have been if there had been an earlier trial.

In Barker v. Wingo, 33 L. Ed. 2d 108, supra, at 109, more than five years had elapsed between indictment and trial of the defendant. The Commonwealth of Kentucky had requested and obtained 16 continuances of the defendant's trial so that it could first try the co-defendant, hoping that conviction would result in his cooperation in the case against Barker. The delay caused minimal prejudice to Barker's defense and no demand for speedy trial was made (at 119). In spite of the exceptionally long delay and the fact that the reasons for the delay were speculative at best, (Barker's co-defendant could have been acquitted, and even if convicted, he could have refused to testify on behalf of the prosecution), this Court, after weighing all the factors, concluded that Barker was not deprived of his due process right to a speedy trial.

In the matter before the Court, the delay was not unusually long, the reasons for the delay were in keeping with the legitimate interests of public justice and petitioner was not prejudiced thereby. It must be conceded that the petitioner did demand a speedy trial. The State maintains, however, that on balance, the facts of the matter before the Court, considered in light of pertinent

decisions of this Court, reveal that the petitioner was deprived of neither due process nor speedy trial.

Conclusion

The respondent submits that this Petition for Writ of Certiorari is premature because there has been no final judgment by the Supreme Court of New Jersey and therefore this Court does not have jurisdiction to grant Certiorari.

The respondent submits further that the petitioner has not been denied speedy trial or due process.

For all the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari by Alex Birnbaum pro se should be denied and dismissed.

Respectfully submitted,

JOHN S. KUHLTHAU
Middlesex County Prosecutor
Attorney for and of Counsel with
Respondent State of New Jersey

THOMAS J. KAPSAK
Assistant County Prosecutor
of Counsel and on the Brief